The *McGirt* decision upholds a principle of US domination of Native Nations

By Steven T. Newcomb and Peter d'Errico

Commentary after the *McGirt v. Oklahoma* decision has split between those who praise it as a victory for "tribal sovereignty" and those who bemoan the "jurisdictional complexity" left in its wake. These perspectives ignore the fundamental reasoning of the decision—affirmation of US "plenary power" over Native nations premised on a claim of "Christian discovery."

Justice Gorsuch's eloquent evocation of historical events encouraged those who praise the decision. From his opening sentence – "On the far end of the Trail of Tears was a promise."— through his acknowledgement that land allotment and other federal actions "represented serious blows to the Creek," to his concluding condemnation of "brazen and longstanding injustices," he offered a tone of solicitude for Native nations. Those who bemoan the *McGirt* decision prefer the perspective of the dissenters, who insisted without qualm that "Congress…eliminated the foundation of tribal sovereignty … [and] extinguish[ed] the Five Tribes' territory."

Missing from both streams of commentary is awareness that the majority and dissent *both* rest their arguments on the foundational federal Indian law principle of US domination over Native nations and peoples. That principle, variously called "plenary power," "guardianship," and "trust relation," is rooted in the 1823 US Supreme Court decision, *Johnson v. McIntosh*. There the court adopted the 15th century doctrine that a "discovery" of "heathens" by "Christian people" resulted in a US title of "ultimate dominion" to all Native lands. *Johnson* said that the Indian "natives, who were heathens" were "merely occupants" in their lands, subject to the US power of domination as the assumed "sovereign" owner of the lands.

The *Johnson* decision has never been overruled. Indeed, the principle was reaffirmed in 1955, in *Tee-Hit-Ton v. US*, only a year after the equally abhorrent doctrine of "separate but equal" was overturned in *Brown v. Board of Education*. Cold War pressures for the US to renounce its legalized racism extended only to the doctrine affecting Blacks. Indeed, the doctrine proclaiming a right of domination over Natives based on the idea of a "discovery" of the lands of "heathens and infidels" by "Christian nations" was explicitly argued in the 1954 US legal brief in *Tee-Hit-Ton*.

Following from the foundational premise of US domination, the *McGirt* decision said the Creek Nation remains under the jurisdiction of the federal Major Crimes Act. That 19th century law was enacted by Congress using its so-called "plenary power" over "Indians." The Act excluded Native jurisdiction and imposed US criminal jurisdiction over certain offenses committed by a Native person against another Native person in "Indian country."

The only difference between majority and dissent in *McGirt* is that the majority said Congress has not "extinguished" the Creek Nation's reservation and it is therefore "Indian country," while the dissent found clear extinguishment in a series of federal actions. The majority and dissent each affirm the "overriding power" of Congress over Native nations and peoples. As Gorsuch said in conclusion, "If Congress wishes to withdraw its promises, it must say so."

Neither Gorsuch nor the dissent say clearly on what basis it is claimed Congress has such overriding power. Gorsuch alluded to the Christian discovery presumption this way: "This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock* (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor

will this Court lightly infer such a breach….” Gorsuch’s citation of *Lone Wolf* leads to the original case, *Johnson v. McIntosh*, and his focus on “Congressional intent” derives from that root.

Gorsuch invoked Christian discovery in a covert way in a cryptic citation purporting to explain why the US can “allow non-Indian settlers to own land on [a] reservation.” Gorsuch wrote, “It isn’t so hard to see why.” He explained that federal homesteader patents “transferred legal title” to Creek land, but “no one thinks … this diminished the United States’s claim to sovereignty. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another.” He then cited “3 E. Washburn, American Law of Real Property *521–*524.”

This reference is to a chapter in Emory Washburn’s 1868 *A Treatise on the American Law of Real Property* discussing “title by public grant.” The chapter begins with a discussion of “the discovery and settlement of this country by Europeans” and says, “Nor has any title, beyond the right of occupation, been recognized in the native tribes by any of the European governments or their successors, the Colonies, the States, or the United States. The law in this respect seems to have been uniform with all the Christian nations that planted colonies here. They recognized no seisin [ownership] of lands on the part of Indian dwellers upon it.” Washburn then says, “The sovereignty and general property of the soil …were claimed …by right of discovery.” This sentence carries a footnote to *Johnson v. McIntosh*.

Gorsuch’s use of a nineteenth century law treatise to reference “discovery” by “Christian nations” is subtle, more subtle by far than Justice Ginsburg, whose opinion in *City of Sherrill v. Oneida Indian Nation of N. Y.* (2005) rejected Oneida land title by saying, “Under the ‘doctrine of discovery,’ fee title to the lands occupied by Indians when the colonists arrived became vested

in the sovereign—first the discovering European nation and later the original States and the United States." (Ginsburg avoided saying "Christian discovery.")

Simply put, the contemporary presumption that Congress has the right to unilaterally breach US Treaty obligations rests on the argument that a "discovery" by "Christian people" of lands inhabited by "natives who were heathens," as Chief Justice John Marshall put it in *Johnson*, results in an assumed power of "ultimate dominion," forever. The fact that *McGirt* ruled in favor of the Creek Nation provides an excuse for not looking into the doctrinal basis of the decision. Make no mistake; *McGirt* rests on the fundamental US claim of a right of Christian domination over the existence of "heathens and infidels."

Steven T. Newcomb is co-founder and director of the Indigenous Law Institute and author of *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Fulcrum, 2008). Peter d'Errico is Professor of Legal Studies Emeritus, University of Massachusetts / Amherst.